

D.T.E. 03-59

August 26, 2003

Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Large Business Customers Served by High-Capacity Loops.

VOTE AND ORDER TO OPEN PROCEEDING

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I. INTRODUCTION

On August 21, 2003, the Federal Communications Commission (“FCC”) released its Triennial Review Order,¹ in which the FCC revised its rules concerning incumbent local exchange carriers’ (“incumbent LECs”) obligations to make elements of their networks available on an unbundled basis to competing carriers. The FCC determined that state public utility commissions would have a substantial role in determining whether competing carriers would be “impaired” by lack of access to an incumbent LEC’s network elements.² To that end, the FCC has required state public utility commissions to conduct proceedings to determine the continued availability of certain unbundled network elements, taking into account market-specific variations, including considerations of customer class, geography, and service. Among other requirements contained in the FCC’s Triennial Review Order, state public utility commissions have 90 days from the effective date of the Order³ to conduct a

¹ Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; and Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, FCC 03-36 (rel. August 21, 2002) (“Triennial Review Order”).

² According the FCC, a competing carrier is “impaired” when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, which are likely to make entry into a market uneconomic. Triennial Review Order at ¶ 84.

³ The effective date of the Triennial Review Order is 30 days after publication of the Order in the Federal Register. Id. at ¶ 830. The Department anticipates that publication will occur within the next few weeks.

proceeding in which to rebut the FCC's conclusion that switching for enterprise market customers (*i.e.*, large business customers) served by high-capacity loops, such as DS-1, need no longer be unbundled given the FCC's national finding of "no impairment." Triennial Review Order at ¶¶ 451, 455. Within that time, states may petition the FCC to waive the finding of no impairment. Id. at ¶ 455.⁴

II. VOTE TO OPEN PROCEEDING

Accordingly, the Department votes to open a proceeding to implement the requirements of the FCC's Triennial Review Order.⁵ This proceeding is docketed as D.T.E. 03-59. The proceeding will investigate the applicability in Massachusetts of the FCC's finding that switching for business customers served by high-capacity loops should no longer be unbundled and will determine whether the Department should petition the FCC for a waiver of its finding. This proceeding will be completed within 90 days following the effective date of the FCC's Triennial Review Order.

⁴ For the purposes of the Triennial Review Order, the FCC defines enterprise market and mass market according to the facilities required to serve them. As a general matter, mass market customers are those customers that can be economically served via DS0 loops, and enterprise customers are those served via DS1 and above, as well as those customers in density zone 1 of the top 50 metropolitan serving areas ("MSAs") that are served by four or more DS0 loops. As part of its investigation into local circuit switching, the Department must determine the point at which multi-line DS0 customers outside of density zone 1 become enterprise customers. See Triennial Review Order at ¶ 497 and n.1376.

⁵ The Department will address the FCC's directive to conduct a proceeding to determine whether switching for mass market customers (*i.e.*, residential and small business customers) will continue to be offered as an unbundled element to competing carriers in a separate docket, D.T.E. 03-60.

In undertaking its investigation, the Department requires the assistance of both the incumbent LEC and competitive local exchange carriers (“CLECs”) to determine whether Massachusetts-specific conditions rebut the FCC’s finding of no impairment. If no Massachusetts CLEC seeks to have the Department rebut the finding, the Department concludes that to attempt to do so without any CLEC involvement might be an unnecessary use of Department resources. Therefore, the Department requires that, in order to proceed with this investigation, at least one CLEC operating in Massachusetts must file with the Department a one-paragraph “Request to Proceed” in this docket by 5:00 p.m. on September 5, 2003. If no CLEC files a written “Request to Proceed” by that time, the Department will determine whether to adopt the FCC’s finding concerning CLECs’ access to switching for customers served by high-capacity loops without undertaking any additional procedure.

Given the short time allowed by the FCC, the Department proposes the following procedural schedule for this proceeding beginning from the effective date of the Triennial Review Order:

Day 1	Discovery begins ⁶
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⁶ Consistent with our requirements in the companion docket, D.T.E. 03-60, the Department anticipates that certain entities may choose not to participate in our Triennial Review proceedings, and as a result, both the parties to this proceeding and the Department may be limited in their ability to obtain needed information. Therefore, as the Department did with its Section 271 Evaluation, D.T.E. 99-271, parties are instructed to forward to the Department all information requests (to intervenors and non-intervenors alike), and the Department will issue the information requests. See Section 271 Evaluation, D.T.E. 99-271, at 12-13, Interlocutory Order on Joint Petitioners’ Appeal of Hearing Officers’ Decisions Dated August 19, 1999 (Sept. 30, 1999); see also Investigation by the Department of Public Utilities upon its own Motion Commencing a Notice of Inquiry/Rulemaking pursuant to 220 C.M.R.

Day 21	Direct testimony filed
Day 28	Rebuttal testimony filed
Day 30	Discovery ends
Days 40-41	Hearing
Day 50	Initial briefs
Day 60	Reply briefs
by Day 90	Order issued

This schedule will be revised upon publication of the Triennial Review Order in the Federal Register to associate the sequence of events with actual calendar days.

Those interested in participating in the Department's proceeding in this docket may submit written comments on the scope, nature, and timing of the Department's inquiry in this proceeding. Written comments must be filed with the Secretary of the Department by 5:00 p.m. on September 16, 2003. The Department requests that those interested in participating in the Department's proceeding indicate in written comments whether this proceeding should be conducted as an "adjudicatory proceeding" as defined in G.L. c. 30A, § 1(1), or whether some other role for the Department is warranted, such as the Department's consultative role in Section 271 Evaluation, D.T.E. 99-271.⁷ In addition, interested persons

§§ 2.00 et seq., Establishing the Procedures to be Followed in Electric Industry Restructuring by Electric Companies Subject to G.L. c. 164, D.P.U. 96-100, at App. A, Order Commencing NOI/Rulemaking and Setting Procedural Schedule (March 15, 1996) (determining that all discovery be issued by Department).

⁷ In D.T.E. 99-271, the Department evaluated Verizon's compliance with the FCC's "14-point competitive checklist" contained in 47 U.S.C. § 271, and recommended to

seeking to participate in the Department's proceeding must file a brief (1-2 pages) letter explaining with specificity their interest and the extent to which they would like to participate. Written requests to participate must be filed with the Secretary of the Department by 5:00 p.m., on September 16, 2003. Receipt of the written request by the Department – not mailing – constitutes filing and determines whether a request has been timely filed.

In addition, the Department requests that all comments and requests to participate be submitted by electronic mail to Jesse.Reyes@state.ma.us and dte.efiling@state.ma.us using one of the following methods: (1) by e-mail attachment; or (2) on a 3.5" disk, IBM-compatible format. The text of the e-mail must specify: (1) the docket number of the proceeding (D.T.E. 03-59), (2) the name of the person or company submitting the filing, and (3) a brief descriptive title of the document. The electronic filing should also include the name, title, and phone number of a person to contact in the event of a question about the filing. Text responses should be written in either WordPerfect (naming the document with a “.wpd” suffix), in Microsoft Word (naming the document with a “.doc” suffix), or as an Adobe PDF file (naming the document with a “.pdf” suffix). Data or spreadsheet responses should be compatible with Microsoft Excel. All comments and requests to participate submitted in electronic format will be posted on the Department's website:

<http://www.mass.gov.dpu>.

the FCC that Verizon be permitted entry into the in-region long distance market. See Evaluation of the Massachusetts Department of Telecommunications and Energy, CC Docket 00-176 (October 16, 2000).

We will hold a procedural conference on September 25, 2003, at 10:00 a.m., at the Department's offices, to establish a procedural schedule for the orderly conduct of this proceeding, and, if necessary, further define the scope of the proceeding. Following issuance of this Vote and Order, the Secretary of the Department will publish the accompanying legal notice, and will serve a copy of this Order on all parties to the Department's UNE Rates Proceeding, D.T.E. 01-20.

III. ORDER

Accordingly, the Department

VOTES: To open a proceeding to implement the requirements of the Federal Communications Commission's Triennial Review Order regarding switching for large business customers served by high-capacity loops; and it is

ORDERED: That competitive local exchange carriers have until 5:00 p.m. on September 5, 2003, to file a written "Request to Proceed" with the Department; and it is

FURTHER ORDERED: That written comments shall be filed with the Secretary of the Department by September 16, 2003, at 5:00 p.m.; and it is

FURTHER ORDERED: That written request to participate in this proceeding shall be filed with the Secretary of the Department by September 16, 2003, at 5:00 p.m.; and it is

FURTHER ORDERED: That a procedural conference in this proceeding will be held at the offices of the Department on September 25, 2003.

By Order of the Department,

_____/s/_____
Paul G. Afonso, Chairman

_____/s/_____
James Connelly, Commissioner

_____/s/_____
W. Robert Keating, Commissioner

_____/s/_____
Eugene J. Sullivan, Jr., Commissioner

_____/s/_____
Deirdre K. Manning, Commissioner